No. 94-197

IN THE
Supreme Court of the United States
October Term, 1994

ELOISE ANDERSON, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY AS DIRECTOR, CALIFORNIA DEPARTMENT OF SOCIAL SERVICES, *et al.*,
Petitioners,

v.

DESHAWN GREEN, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE WASHINGTON LEGAL FOUNDATION; UNITED STATES REPRESENTATIVES MICHAEL HUFFINGTON, STEPHEN HORN, AND RICHARD POMBO; CALIFORNIA SENATORS K. MAURICE JOHANNESSEN, DAVID KELLEY, NEWTON RUSSELL, DON ROGERS, BILL LEONARD, PHIL WYMAN, TIM LESLIE, AND ROB HURTT; CALIFORNIA STATE ASSEMBLY MEMBERS MICKEY CONROY, RICHARD K. RAINEY, DEAN ANDAL, PAULA L. BOLAND, RICHARD L. MOUNTJOY, JAMES ROGAN, BILL MORROW, BERNIE RICHTER, BILL HOGE, DAVID KNOWLES, TRICE HARVEY, AND JAN GOLDSMITH AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF OF THE WASHINGTON LEGAL FOUNDATION, ET AL., AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a national non-profit public interest law and policy center with over 100,000 members and supporters nationwide whose

interests WLF represents. WLF engages in litigation and participates in administrative proceedings in a variety of areas and devotes a substantial amount of its resources to cases that affect the interests of voters and taxpayers. For example, WLF filed *amicus* briefs in *United States v. Carlton*, 114 S. Ct. 2018 (1994) (validity of retroactive changes in federal tax statute) and *U.S. Term Limits, Inc. v. Thornton* (Sup. Ct. No. 93-1456) (validity of state term limits for Members of Congress).

The twenty-three legislators joining this brief are members of California's delegation to the U.S. House of Representatives, the California Senate, and the California State Assembly who strongly support California's position in this case. Those legislators — United States Representatives Michael Huffington, Stephen Horn, and Richard Pombo; California Senators K. Maurice Johannessen, David Kelley, Newton Russe", Don Rogers, Bill Leonard, Phil Wyman, Tim Leslie, and Rob Hurtt; and California State Assembly Members Mickey Conroy, Richard K. Rainey, Dean Andal, Paula L. Boland, Richard L. Mountjoy, James Rogan, Bill Morrow, Bernie Richter, Bill Hoge, David Knowles, Trice Harvey, and Jan Goldsmith — believe that the ruling below unnecessarily and detrimentally limits the state's ability to carry out the budget cuts that have been made necessary by its fiscal crisis.

The motion of *amici* for leave to file their brief in support of the petition for certiorari was granted on October 3, 1994. *Amici* submit this brief in support of Petitioners with the written consent of both parties. Letters of consent have been lodged with the Clerk of this Court.

SUMMARY OF ARGUMENT

The California statute at issue in this case, California Welfare and Institutions Code § 11450.03, was enacted in 1992 during a period of fiscal crisis in the state. The statute, a welfare reform measure, establishes a reduced level of benefits under the Aid to Families with Dependent Children (AFDC) program during the first twelve months of a recipient's residence in California. For most new residents, that level is the benefit level they would have received if they were still living in their former state.

The decision below, in declaring this measure a violation of equal protection, treated this measure essentially as if it were identical to the residency requirements considered in *Shapiro v. Thompson*, 394 U.S. 618 (1969). In that case, this Court struck down state and District of Columbia laws that prevented newcomers from receiving *any* assistance under the AFDC program for the first twelve months of residence in the state. But unlike the situation in *Shapiro*, in which this Court applied strict scrutiny on the basis that the programs amounted to a "penalty" on the right of interstate travel, California's denial of an *increase* in a newcomer's former benefit level is hardly a "penalty" on the newcomer's travel in any conventional sense.

Under the properly applicable standard of rational basis review, California's program is justified as a means of reducing welfare expenditures while allocating the reductions so that they fall in greater proportion on those who are relatively better able to absorb them. In comparison with established residents, who may have longstanding ties to a particular area, newcomers who are

welfare recipients can more easily adjust to cuts through such decisions as their choice of communities.

Further, even if the Constitution is held to require enhanced scrutiny of residency-based programs that states have established solely on their own authority, rational basis review should still apply when, as here, the state program has been approved by the U.S. Department of Health and Human Services pursuant to congressionally-delegated authority.

ARGUMENT

I. CALIFORNIA'S RESIDENCY-BASED WELFARE BENEFIT LEVELS SHOULD NOT BE DEEMED A "PENALTY" UPON THE EXERCISE OF THE RIGHT TO INTERSTATE TRAVEL

In *Shapiro*, this Court struck down state and District of Columbia laws that prevented newcomers from receiving any assistance under the AFDC program for the first twelve months of residence. As this Court subsequently pointed out, however, the *Shapiro* decision did not announce an outright prohibition on all residency-based classifications:

> Although any durational requirement impinges to some extent on the right to travel, the Court in *Shapiro* did not declare such requirements to be *per se* unconstitutional. The Court's holding was conditioned . . . by the caveat that some "waiting-period or residence requirements . . . may not be penalties upon the exercise of the constitutional

> right of interstate travel." The amount of impact required to give rise to the compelling-state-interest test was not made clear.

Memorial Hospital v. Maricopa County, 415 U.S. 250, 256-57 (1974) (quoting *Shapiro*, 394 U.S. at 638 n.21).

The district court decision below, adopted by the Ninth Circuit, found California's residency-based benefit levels to be a "penalty" on the ground that they treat recent residents of California different from other California residents and involve "necessities of life." Pet. App. A14. Hence, the court held that strict scrutiny was applicable and that the classification could not be justified by the state's interest in "conserv[ing] limited State funds in the hope that the State may do more for those who now and in the past have depended on the State." Pet. App. A16.

Because § 11450.03 generally provides new residents the same AFDC benefits that they had been receiving before moving to California, however, the statute can hardly be said to "penalize" interstate migration in any normal sense of the word. Nor does the statute deny newcomers the exercise of a fundamental right, such as the right to vote. *See Dunn v. Blumstein*, 405 U.S. 330 (1972). The rational basis standard should therefore govern in this case.

The court below characterized the program as denying "the necessities of life" in part on the basis that it "makes no accommodation for the different costs of living that exist in different states." Pet. App. A13. But that is a feature of the federal AFDC program itself, which permits a state to set its benefit level at an amount less than the standard

of need it has calculated; under 42 U.S.C. § 602(a), a state is free to "pare down payments to accommodate budget realities by reducing the percentage of benefits paid or switching to a percent reduction system." *Rosado v. Wyman*, 397 U.S. 397, 413 (1970).

Thus, even a state with no residency-based benefit levels may "penalize" a newcomer or deny "necessities of life" in the sense of failing to set benefits at a level commensurate with the costs of living in his or her new state. But this Court has never indicated that such a failure implicates the right to travel or any other constitutional right.

The applicability of rational basis review to this case is even more clear in light of this Court's cases since *Shapiro* in which this Court has distinguished the imposition of a penalty upon the exercise of a constitutional right from the refusal to subsidize the exercise of a constitutional right. The "decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny." *Regan v. Taxation Without Representation of Washington*, 461 U.S. 540, 549 (1983). Here, California has not "regulated" the right to travel, but has, at most, "simply chosen not to pay" the costs associated with its exercise. *Id.* at 546.

Like the classification in the Food Stamp Act upheld by the Court in *Lyng v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America*, 485 U.S. 360 (1988), which denied food stamps to households of striking workers, California's classification "does not 'order or prevent'" anyone from migrating to the state. *Id.* at 365 (citation omitted). The Court noted in *Lyng*, "Strikers and their union would be

much better off if food stamps were available, but the strikers' right of association does not require the Government to furnish funds to maximize the exercise of that right." *Id.* at 368.

II. THE VALIDITY OF CALIFORNIA'S PROGRAM IS FURTHER SUPPORTED BY CONGRESSIONAL AUTHORIZATION

The Ninth Circuit's decision overturned not only the judgment of the California legislature that enacted the statute in 1992, but also that of HHS, which had approved it on October 29, 1992, under 42 U.S.C. § 1315(a), as an "experimental, pilot or demonstration project." Pet. 4-5. In approving the program, HHS was obliged to determine that § 11450.03 "is likely to assist in promoting the objectives of" the federal Aid to Families with Dependent Children program. § 1315(a).

Hence, even if California's program is held to be a "penalty" upon travel by indigents, the question is not the standard of review to be applied when a state establishes such a program on its own, but the standard of review to be applied when a state establishes such a program with federal authority. The existence of federal approval provides an independent reason for employing a deferential "rationality review" of the California legislature's adoption of residency-based benefit levels.

In *Shapiro*, the Court found that the Social Security Act contained no congressional approval for residency requirements. The Court further indicated, however, that such approval would be unavailing for the states in any event because "Congress is without power to enlist state cooperation in a joint federal-state program by legislation

which authorizes the States to violate the Equal Protection Clause." 394 U.S. at 641.

That analysis is truncated, and should be reconsidered by this Court. The Equal Protection Clause ordinarily requires only "rational basis" review of classifications in welfare measures. *See Dandridge v. Williams*, 391 U.S. 471 (1970). The asserted basis for enhanced scrutiny of residency requirements is not the Equal Protection Clause itself, but a right to travel based on some other constitutional guarantee. *See Shapiro*, 394 U.S. at 630 & n.8.

But as Justice Harlan pointed out in dissent, three of the provisions suggested as bases for that right — the Privileges and Immunities Clause of Art. IV, § 2, the Privileges and Immunities Clause of the Fourteenth Amendment, and the Commerce Clause — are inapplicable to Congress and can be overridden by Congress in their application to the states. *See Shapiro*, 394 U.S. at 666-67 (Harlan, J., dissenting). Moreover, as Chief Justice Warren indicated in dissent, the Commerce Clause, as an affirmative grant of power to Congress, provides ample authority for Congress to allow residence requirements by the states. *See Shapiro*, 394 U.S. at 651 (Warren, C.J., dissenting).

In the view of the *Shapiro* majority, it had "no occasion to ascribe the source of this right to travel interstate to a particular constitutional provision." 394 U.S. at 630. At least where, as here, the contested provision of state law places only a burden upon interstate travel — if it does that much — and does not regulate anyone's travel into the state, the appropriate analytical

framework is that developed by this Court in deciding claims based on the "dormant" Commerce Clause.

"When Congress so chooses, state actions which it plainly authorizes are invulnerable to constitutional attack under the Commerce Clause." *Northeast Bancorp., Inc. v. Board of Governors of the Federal Reserve System*, 472 U.S. 159, 174 (1985). Federal regulations adopted pursuant to congressional authority can also authorize state actions that would otherwise violate the Commerce Clause. *See White v. Massachusetts Council of Construction Employers, Inc.*, 460 U.S. 204, 213-15 (1983).

Here, HHS has authorized § 11450.03 pursuant to a valid congressional delegation of power. As noted, HHS approved California's program under 42 U.S.C. § 1315, which allows a state, with federal approval, to undertake a demonstration project that is free from the federal statutory restrictions that normally limit the discretion of a state in structuring its AFDC program. Given the presence of federal administrative approval as a basis of authority for the program and as an independent check upon it, strict scrutiny is particularly inappropriate with regard to the "right to travel" claim presented in this case.

III. THE CLASSIFICATION IN § 11450.03 IS JUSTIFIED BY THE DIFFERING RELIANCE INTERESTS OF LONGTIME RESIDENTS AND NEWCOMERS

The residency-based benefit levels adopted by California easily pass rational basis review. "In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against

equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *F.C.C. v. Beach Communications, Inc.*, 113 S. Ct. 2096, 2101 (1993).

Residency-based cuts in welfare have such a basis: They allocate cuts in benefits so that the cuts fall in greater proportion on those who can best shoulder them. In comparison with established residents of the state, who are more likely to have longstanding ties to a particular area, newcomers who are welfare recipients can more easily adjust to cuts through their choice of communities and lifestyles.

California has long been suffering under a budgetary crisis. In 1992, the year that § 11450.03 was enacted, the state was in such straights that it was forced to pay its employees with I.O.U.'s known as "registered warrants," which some banks refused to accept. *See* Michael Meyer, *California's Broke — But Who Will Fix It?*, Newsweek, Aug. 17, 1992, at 37. The state's financial problems have persisted to this day. *See California's Budget: IOU All Over Again?*, The Economist, July 2, 1994, at 24; George Graham, *California Faces A New Budget Crisis*, Financial Times, June 18, 1994, at 3.

The residency-based welfare benefit levels were expected to make a modest, but useful, contribution to the state's budgetary outlook. The record indicates that the district court's suspension of the implementation of § 11450.03 was predicted to "result in additional, unbudgeted state General Fund costs in the AFDC program of $8.4 million in fiscal year 1992-93, and $22.5 million in

fiscal year 1993-94."[1] (The AFDC benefit levels of longtime residents were also reduced in 1992 as part of a work incentive program that was later invalidated by the Ninth Circuit. *See Beno v. Shalala*, 30 F.3d 1057 (9th Cir. 1994)).

The court below found, without analysis, that new residents are "no better able to bear the loss of benefits than a group randomly drawn." Pet. App. A17. This conclusion has no apparent basis in the record, and "those attacking the rationality of the legislative classification have the burden 'to negative every conceivable basis which might support it.'" *Beach Communications*, 113 S. Ct. at 2102 (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)).

While recipients of public benefits do not, of course, have a constitutional right to continued receipt of their benefits at accustomed levels, a state's desire to respect expectation and reliance interests has repeatedly been recognized by this Court as a legitimate objective, although it necessarily discriminates against the interests of newcomers. *See, e.g., Nordlinger v. Hahn*, 112 S. Ct. 2326 (1992); *Heckler v. Mathews*, 465 U.S. 728, 746 (1984); *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 178 (1980); *New Orleans v. Dukes*, 427 U.S. 297, 305 (1976).

In *Nordlinger*, the Court considered an amendment to the California Constitution that restricted any increases in the assessed value of real property to 2 percent each year.

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[1] Declaration of Dennis Hordyk, Assistant Director, California Dept. of Finance, Pet. App. A22.

112 S. Ct. at 2329. Sales of property triggered new assessments at market value. *Id.* Because real estate prices were escalating, the scheme forced newcomers to pay considerably higher real estate taxes than longtime owners. *Id.*

This Court, applying the rational basis standard, cited two grounds sufficient to uphold the classification: the state's interest "in local neighborhood preservation, continuity, and stability," and the fact that "a new owner at the time of acquiring his property does not have the same reliance interest warranting protection against higher taxes as does an existing owner." *Id.* at 2333. Here, as in *Nordlinger*, the State may have thought established residents hold greater "vested expectations" in their level of AFDC benefits and in the lifestyle, however modest, that they have been able to finance with those benefits for their children. Moreover, a prospective new resident "has full information" about the reduced benefits when he or she moves into the state, and can consider them in deciding whether to move. *Id.*[2] These legitimate, non-invidious reasons for the distinction are sufficient to justify it.

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[2] The district court referred to evidence that some supporters of the program regarded it as a means of deterring migration into the state, and indicated that "this may be the purpose," but the court properly declined to make any such factual finding. Pet. App. A15. In the absence of such a finding, at least, "it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature." *Beach Communications*, 113 S. Ct. at 2102.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be reversed.

Respectfully submitted,

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